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IN THE

Supreme Court of the United States

October Term, 1943.

No. 893.

HELEN VAN ZILE ANTHONY and WILLIAM D. SMITH,

Petitioners,

against

UNITED STATES TRUST COMPANY OF NEW YORK,

Respondent.

Petition for Writ of Certiorari and Brief in Support of Petition.

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THE REPORTER COMPANY, Inc., New York City
1944

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No.

HELEN VAN ZILE ANTHONY and WILLIAM D. SMITH,
Petitioners,
against
UNITED STATES TRUST COMPANY OF NEW YORK,
Respondent.

Petition for Writ of Certiorari.

The petitioners, Helen Van Zile Anthony and William D. Smith, pray that a writ of certiorari issue to review the order of the Court of Appeals of the State of New York entered January 20th, 1944, denying the motion of the petitioners for an order certifying that a constitutional question under the due process provision of the Federal Constitution is directly involved on the appeal taken to that court from the judgment entered on the order of the Appellate Division of the Supreme Court of the State of New York, October 9, 1943, affirming judgments of the Special Term of that court of June 26, 1942, and September 4, 1942, holding that the petitioners' constitutional rights had not been invaded under the due process provision of the Federal Constitution,

and affirming an order denying a motion to dismiss the action made August 15, 1940, and the order of the Court of Appeals of the State of New York made January 27, 1944, dismissing petitioners' appeal on the ground that no constitutional question was directly involved under the due process provision of the Federal Constitution, and to review the judgment of affirmance of the Appellate Division aforesaid.

Opinions Below.

The Special Term rendered an opinion which is unreported and set forth in the record (20-30). The Appellate Division affirmed the judgment without opinion (266 App. Div. 951) and the Court of Appeals rendered no opinion, 292 N. Y. (mem.) 513, 514.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code on the basis that the judgments below were based entirely on a decree of the Surrogate's Court, New York County, made without pleadings, without notice, without a trial and without jurisdiction, contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States, and based on said decree the judgment adjudicates that the respondent here is the trustee by acquiescence of the petitioners' property and has unlimited right to and did manage the said property, and to impose and did incur expenses thereon without her consent, and divests petitioners of a cause of action for conversion of the property thus burdened which is thus adjudicated, amounting to the taking of petitioners' property without due process of law.

The opinion of the Surrogate on that decree is reported in 173 Misc. 1042. The appeal from the decree taken on procedural grounds was affirmed without opinion, two justices joining in a dissenting opinion, 262 App. Div. 703. An appeal to the Court of Appeals on the same grounds was affirmed without opinion, 287 N. Y. 645 (328-329).

A motion for reargument made on the ground that the petitioners' constitutional rights had been invaded, opposed on the ground that the assertion of a constitutional question on reargument comes too late and that the rules on reargument were not complied with, was denied, 287 N. Y. 754.

Certiorari to this Court, opposed on the ground that a constitutional question raised on reargument in the Court of Appeals is not certiorariable, was denied by this Court, 315 U. S. 822.

The decree is now directly attacked on the appeal from the judgment herein by answer in this action, on the trial and on the appeal.

The application is based on the record heretofore filed in this Court on the prior application for certiorari and on the record herein presented (345).

The references to the Record of Appeal from the Surrogate's decree will be preceded by an "S." The reference in this record omit the "S." If reference is simultaneously made to both records the references to this record precede the references to the Surrogate's decree record.

Question Presented.

Is a judgment adjudicating the rights of the petitioners to an interest in real property, giving the respond-

ent proprietary dominion over said property and the unlimited right to manage the property as trustee by consent, to impose expenses and charge them against the petitioners and allowing charges so made and the right to sell the property all without the consent of the petitioners and depriving the petitioners of their vested right in a cause of action in a pending Supreme Court action of conversion of the property thus burdened based entirely on a decree giving those rights entered and made without trial, pleadings, notice, jurisdiction, and the right to be heard void under the due process provision of the Federal Constitution as a taking of property without due process of law?

Statement.

By the judgment sought to be reviewed there has been imposed on the petitioner Anthony a one-eleventh part of all disbursements resulting in a loss incurred by the respondent Trust Company in managing a parcel of realty taken by it in lieu of foreclosure on which it had previously taken a mortgage of $110,000 and allocated as testamentary trustee a $10,000 participation to a trust for life terminated October 13, 1935, of which the petitioner was remainderman. There has also been imposed by said judgment all such expenses so incurred in perpetuity and all legal expenses of the respondent in depriving the petitioners of a trial, which expenses are made a lien on the participation (52), which participation the petitioners assert had been previously converted by the respondent. The expenses of an accounting proceeding in the action together with the costs of the action are also charged against the petitioners (53, 265-266).

This judgment is based in its entirety on the decree of the Surrogate's Court, New York County, holding

without pleadings and without jurisdiction, without notice and trial as aforesaid, that the petitioner had given the respondent Trust Company plenary power to manage the property by signing a receipt acknowledging the delivery of a certificate of participation (20-30; S. 6-8, 11-14). The petitioner, William D. Smith, has been bereft of a cause of action for conversion of the participation on which respondent imposes a lien for its charges.

The action resulting in such judgment was brought in the Supreme Court, New York County, by the respondent as plaintiff, for a judicial settlement of its account with respect to a $10,000 participation in a mortgage of $110,000 on Madison Avenue premises in New York City and that the plaintiff's charges for advances thereon and the lien of the plaintiff thereof be fixed and that the interest of the petitioners in said premises be defined and alleges that its claim is based on the decree of the Surrogate's Court (5-10). The answer pleads the invalidity of the decree relied on as a basis for the action under the due process provision of the Constitution (11-18). Based on that decree the petitioners were precluded from submitting any evidence to contradict the basic claim of the respondent (100-101, 6, 127, 128, 62, 99, S. 182).

As the petitioners claimed conversion of the participation, they could not consistently offer proof of the affirmative malfeasance of the respondent in the management of the property and of dominion over the petitioners' property (26, 71-72, 215, 224-226). The same position was taken on the accounting (274-278).

On the death of her mother in October, 1935, petitioner Helen Van Zile Anthony, as sole remainderman (58, 18, 226, 240-241) refused the request of the Trust Company for a power of attorney to the respondent Trust Company to manage the

participation here involved and another participation for $4,500 on other real property which the respondent Trust Company had allocated as testamentary trustee under petitioners' grandmother's will to a trust for the life of her mother (S. 96, 138-139, 187, 190-191, 194-195, 149, 113, 121-123, 190-191, 106, 126, 130, 133, 199-201, 178, 216, 234). After such refusal and on the promise and agreement of the Trust Company respondent to deliver to her an assignment of the participation free from any agency on the part of the Trust Company to manage the property the petitioner Anthony signed on May 26, 1933, a receipt and release acknowledging the receipt of said certificates without the actual delivery of them to her (S. 133-149, 154-155, 158, 178). Because she later signed a receipt acknowledging delivery to her of documents enclosed which contained the certificates above described retaining proprietary dominion by the Trust Company over her property contrary to her demand (174-176, S. 202-205) and contrary to the promise and agreement of the Trust Company, without then discovering the deception, petitioner Anthony has been charged with repudiating her release, has been denied a trial under the due process provision under the Federal Constitution, her $10,000 confiscated, and has been compelled to pay, and will be compelled to pay perennially onerous charges of the Trust Company imposed on this certificate.

On discovery of the deception the petitioner, Anthony, repudiated the receipt and release and demanded her property (284, 301-302, 174-177, S. 170-171). In the course of lengthy negotiations looking to an adjustment, the respondent Trust Company paid the $4,500 participation in full with interest (164, 158, 191, 202, 284, S. 105, 170-171). On refusal of the Trust Company to pay the second participation, in November, 1939, an action was brought in the Supreme Court, New York County,

by the petitioner William D. Smith as assignee of the petitioner Helen Van Zile Anthony, for the conversion of the participation herein involved (S. 223-231), in which action this respondent served an answer admitting that the said petitioners refused its request for a power of attorney to manage the participation and that the receipt and release had been conditionally delivered and as separate defenses it pleaded release, account stated and the statute of frauds (S. 233-238).

Although on motions made by it in this Supreme Court action the respondent admitted that the entire former trust fund had been delivered and accepted with the exception of the participation in issue in the action (S. 131, 242, 250-254), the respondent brought a proceeding in the Surrogate's Court, New York County, asking that the validity of the release which it had put in issue in the Supreme Court action be determined (S. 237-238, 23) and in the event that the release be declared invalid that its account be judicially settled (23).

These petitioners filed an answer to the Surrogate's proceeding demanding a dismissal on the ground that there was no subject-matter extant upon which the Surrogate could exercise jurisdiction (S. 71-77).

As the Surrogate's Court had no jurisdiction to try the issues of the Supreme Court action without an order of the Supreme Court directing such a trial, the Trust Company, respondent here, moved for such an order (154-179). While this motion was still pending and undetermined, the Trust Company served notice of hearing ostensibly on the issues set forth in petitioners' answer demanding a dismissal of the proceeding. It is uncontradicted that respondent had previously announced that this issue only would be brought on for hearing (288-289, 301-302). Although the petitioners uncontradictedly announced that the hearing was limited to the trial of is-

sues set forth in the answer demanding a dismissal of the proceeding (S. 80, 82-83, 86, 87-89, 110, 111), the Trust Company, with the acquiescence of the Surrogate, proceeded to try all the issues under the pleadings in the Supreme Court action not in issue on this hearing over the objection of these petitioners (S. 97, 100, 110-121) and also proceeded to prove its account deferred by its own petition until after the decree if ever was determined invalid (S. 23). The petitioners were directed on that hearing to submit any proof to the contrary under the pleadings in the Supreme Court action without notice and without a trial (S. 110-111).

The decree decides all the issues in the Supreme Court action as to all occurrences to June 8, 1936, the date upon which the Surrogate held that the participation certificates had been delivered (S. 264, 159-163). The Surrogate further held that the Trust Company after June 8, 1936, was custodian and not trustee of the participation with all the arrogated powers previously described (S. 6-7, 13-14, 84, 85, 102, 103, 112, 113).

This action was brought immediately after the entry of the decree by the Surrogate on the ground that the Surrogate had no jurisdiction to adjudicate the rights of the petitioners with reference to the participation certificate although he had decreed that the Trust Company had plenary authority to manage the property.

The decision of the Special Term is predicated entirely on the decree adjudging the authority of the Trust Company under the certificate of participation (318-325).

After the decree was entered and after this action was brought, the Trust Company, in an informal letter to the Judge, withdrew its motion to transfer the trial of the Supreme Court action to the Surrogate's Court (1, 180-181, 186). The additional facts set forth in the accompanying brief are hereby made part of this petition.

Specification of Error.

The judgment herein is void in that the decision and decree of the Surrogate's Court upon which it is based were rendered on issues not within and not responsive to the pleadings before that Court and not litigated and were made without any pleadings upon which to base them and upon pleadings in an action pending in the Supreme Court, New York County, and are, therefore, void under the due process provision of the United States Constitution.

2. The judgment herein is void in that it is predicated and based entirely upon the aforesaid described decree in that the petitioners were deprived of any trial framed by the pleadings in the Supreme Court action and without notice were deprived of their property contrary to the due process provision of the Constitution of the United States.

3. The judgment herein is void in that it is based on the decree aforesaid and by such decree the petitioners herein were deprived of their vested right in the cause of action set forth in the action pending in the Supreme Court for conversion of the very property on which charges are made against petitioners.

4. The judgment herein is void in that it is based upon a decree of the Surrogate's Court made without jurisdiction.

Reasons for Granting the Writ.

The petitioners herein have been held to be owners of a participation which they allege was converted by the respondent and without a trial, pleadings or jurisdiction as aforesaid, have been held to be *cestuis qui trust* of the respondent and the respondent has been given plenary

power to deal with the property in perpetuity to incur and has incurred expenses thereon and to impose and has imposed them on the petitioners at their own will subject only to actual malfeasance, and in the exercise of such power has done so, all of which constitutes a depriviation of the petitioners' property without due process of law.

Dated, New York, March 30, 1944.

Respectfully submitted,

ELI J. BLAIR,
Counsel for Petitioners.